

Overruled by N.D.A.G. 96-L-219

Date Issued: June 28, 1982 (AGO 82-52)

Requested by: Bruce E. Kretschmar, McIntosh County State's Attorney

- QUESTION PRESENTED -

Whether a board of county commissioners, pursuant to section 57-15-06.3(2) of the North Dakota Century Code may increase the mill levy for a county road program without holding an election on the proposed mill levy increase.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a board of county commissioners, pursuant to section 57-15-06.3(2), N.D.C.C., may not increase the mill levy for a county road without holding an election on the proposed mill levy increase.

- ANALYSIS -

Section 57-15-06.3(1), (2), N.D.C.C., currently provides as follows:

**57-15-06.3. COUNTY ROAD PROGRAM OF FARM TO MARKET
AND FEDERAL AID ROADS - TAX LEVY - USE OF EXCESS FUNDS.**

1. The board of county commissioners of any county in this state may prepare a proposed county construction program of farm-to-market and federal aid roads on the county road system, setting forth a general description of the roads to be constructed, the location of bridges constituting a part of the program, the approximate total mileage, and the priority of construction. After approval of the program by the state highway department and the federal highway administration, the board may submit the program to the electors of the county with the question of levying a tax of not to exceed fifteen mills upon the net taxable assessed valuation of all property in the county for the completion of the program by matching, from the proceeds of the tax, federal funds available for federal aid, secondary and feeder roads, farm-to-market roads, and all roads as provided for under federal aid highway Acts. If the majority of the electors voting on the question approved the program and levy, the board shall levy a tax not in excess of fifteen mills. The levy shall not be subject to the county mill levy limitations. The proceeds of the tax shall be used, except as provided in this section, only for matching federal aid available for the program which shall be the official county road program.

2. If the board of county commissioners determines that a Substantial change is necessary in the details of the program of farm-to-market and federal aid roads previously approved by the electors of the county, the board shall set a date for a public hearing on the proposed amendment to the program. Notice shall be published in the official newspaper of the county once a week for three consecutive weeks before the date of public hearing. The board, after approval of the amendment by the state highway department and the federal highway administration, may officially amend the program. The program, as amended by the board, shall become the official county road program.

Subsection 2 grants authority to the board of county commissioners to make a substantial change in the details of the program of farm-to-market roads as previously voted on by the electorate. Subsection 1 contains language defining the program as:

. . . a proposed county construction program of farm-to-market and federal aid roads on the county road system, setting forth a general description of the roads to be constructed, the location of bridges constituting a part of the program, the approximate total mileage, and the priority of construction. . . .

After receiving approval of the proposed program from the state highway department and the federal highway administration, the program, along with the question of levying a tax, is submitted to the voters for approval. Although the approval of the program and the levying of taxes are submitted as one measure, they do not merge into one for the purpose of authorizing the board of county commissioners to increase the tax levy without having an election on the question.

Section 57-15-06.3, N.D.C.C., constitutes an exception to the provisions of section 57-15-06, N.D.C.C., which imposes a limitation on county tax levies, including the levy for road and bridge purposes. As such, it should be strictly construed to authorize an excess tax levy only to the extent approved by the electorate.

Also, if a mill levy was imposed beyond that authorized by the electorate, any debt incurred in reliance upon the expenditure of such taxes may be voided under the provisions of section 57-45-07, N.D.C.C. That section states as follows:

57-45-07. DEBTS OF MUNICIPALITIES VOID IF ENTAILING TAXATION BEYOND THE RATE FIXED BY LAW. It shall be unlawful for any city, county, or township officer, or for the officers of any school district, unless specially and expressly authorized by law, to contract any debt or incur any pecuniary liability, for the payment of either the principal or interest, for which, during the current year, or any subsequent year, it shall be necessary to levy on the taxable property of such county, township, city or school district, a higher rate of tax than the maximum rate prescribed by law, and every contract made in contravention of the provisions of this section shall

be null and void in regard to any obligation thereby imposed on the corporation on behalf of which such contract purports to be made, but every commissioner, officer, agent, supervisor, or member of any municipal corporation which makes or participates in making, or authorizes the making, of any such contract, shall be held individually liable for its performance, and every commissioner, supervisor, director, or member of any city governing body or other officer or agent of any such municipal corporation, present when any such unlawful contract was made or authorized to be made shall be deemed to have made, or to have participated in making, or to have authorized the making of, the same, as the case may be, unless, if present, he dissented therefrom and entered or caused such dissent to be entered on the records of such municipal corporation.

It is my further opinion that if section 57-15-06.3(2), N.D.C.C., would authorize an increase in the mill levy by action of the board of county commissioners, it would not have a retroactive application to the mill levy adopted by the voters of the county in June of 1964 and in September of 1968. A similar question was posed and answered in Attorney General's Opinion 82-8, wherein it is stated:

Section 1-02-10, N.D.C.C., addresses the question of retroactive application of the Century Code. That section states:

1-02-10. CODE NOT RETROACTIVE UNLESS SO DECLARED. No part of this code is retroactive unless it is expressly declared to be so.

While the Legislature may have authorized the method of taxation for the financing of a county road program, the ultimate decision of whether or not to implement such a program rested with the citizens of the various counties. Once the citizens approved the tax, established the purposes for which it could be expended, and the other details of the program, a subsequent legislative act cannot be construed in a manner that would change the benefits the electorate have conferred upon themselves.

-EFFECT-

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Myron E. Bothun
Assistant Attorney General